Supreme Court, U.S.
FILED

(2)

No. 03 889 OCT 24 2003

IN THE

Supreme Court of the United States

HOWARD EARL MCBRIDE,

Petitioner

v.

JOSEPH GALLEGOS, JR.,

Respondent and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY,

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Tenth Circuit

JOINT APPENDIX

HOWARD EARL MCBRIDE
665 E. 300 N.
Kaysville, UT 84037
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Acting *Pro Se*

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B. Relevant Docket Entries in All Lower Courts:

1. Applellate Court (10th Circuit) Order and Judgment:

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT **JUL 30, 2003**

PATRICK FISHER
Clerk

HOWARD E. McBRIDE,

Plaintiff-Appellant

v.

JOSEPH GALLEGOS JR.,

Defendant-Appellee

And

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY; DAVID PENA,

Defendants.

No. 02-4216
(D. Utah)
(D. C. No. 2:01-CV-979- DAK

ORDER AND JUDGMENT

Before **SEYMOUR, MURPHY,** and **O'BRIEN,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Mr. Howard E. McBride, acting pro se[1], appeals the dismissal of his Title VII[2] discrimination complaint against Jr. Joseph Gallegos, Jr., the director of a state agency. The district court dismissed the complaint based on quasi-judicial immunity, qualified immunity for government officials, and failure to state a claim under Title VII. Exercising jurisdiction pursuant to 28 U.S.C. § 1291 (2002), we affirm.

• This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata*, and collateral estoppel. The court generally disfavors the citations of orders a judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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[1] We liberally construe Mr. McBride's *pro se* pleadings. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1187 (10th Cir. 2003).

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

While employed by American Express Travel Related Services Company ("American Express"), Mr. McBride filed a discrimination complaint[3] against his employer with the Utah Division of Antidiscrimination and Labor ("the Division"). His employment was terminated, according to him, when American Express received notice that his discrimination claim would be investigated by the Division. Following his termination, Mr. McBride amended his complaint with the Division alleging retaliatory discharge. The Division investigated, found no discrimination, and on May 22, 2001, the director, Mr. Gallegos, issued a Determination and Order dismissing Mr. McBride's complaint.

On December 10, 2001, Mr. McBride brought a Title VII discrimination complaint in federal court against American Express and the Division, alleging violations of his civil rights. The Division moved to dismiss the claim against it because it was not Mr. McBride's employer, the proper defendant under Title VII, and based on Eleventh Amendment immunity. The district court dismissed the complaint against the Division on April 10, 2002, but allowed Mr. McBride the opportunity to amend.

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[3] Mr. McBride charged his employer with discriminatory conduct based on age, sex, and disability.

In his amended complaint, Mr. McBride named the Division director, Mr. Gallegos, as a defendant[4]. Mr. Gallegos filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). The district court granted the motion on September 13, 2002, based on quasi-judicial immunity, qualified immunity for government officials, and failure to state a claim under Title VII. On September 24, 2002, the district court granted Mr. Gallegos Motion for Rule 54(b) Certification, directing entry of final judgment and dismissing with prejudice all claims against him. Mr. McBride's suit against American Express continues in the district court.

Mr. McBride appeals the dismissal of his complaint against Mr. Gallegos. As best we understand his arguments, he claims (1) the district court erred in concluding Mr. Gallegos was entitled to immunity, and (2) the Division investigation, performed under the direction of Mr. Gallegos, denied Mr. McBride due process rights.[5]

We review de novo a dismissal for failure to state a claim upon which relief can be granted. *Sutton v. Utah State Sch. for Deaf*

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[4] His amended complaint also named Mr. David Pena as a defendant. Mr. Pena was the Division employee who investigated Mr. McBride's discrimination charge. Mr. Pena was not served in this action, and thus is not a party to the lawsuit. *See Bristol v.Fibreboard* Corp, 789 F.2d 846-847-48 (10th Cir. 1986).

[5] Mr. McBride presents a litany of other issues for review, including abuse of governmental power, unjust outcome at the trial court, uneven enforcement of the Antidiscrimination statute, inappropriate judgment for dismissing all claims against Mr. Gallegos with prejudice, condoning a cover-up of a corrupt legal process, bias in the trial court against Mr. McBride, and substitution of the trial court's own theories in place of documentary evidence. Each of these allegations is subsume in the broader contention that the district court erred in granting Mr. Gallegos's Motion to Dismiss. As such, these secondary issues will only be discussed to the extent they are relevant to the broader issue of proper dismissal of a named defendant. Most are not discussed because they are frivolous.

We review de novo a dismissal for failure to state a claim upon which relief can be granted. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F. 3d 1226, 1236 (10th Cir. 1999). After a careful review of the record and applicable law, we agree with the district court's thoughtful decision.[6]

First, Mr. Gallegos is immune from suit under the doctrine of absolute quasi-judicial immunity. *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Butz v. Economou*, 438 U. S. 478, 512-14 (1978). As director of the Division he had adjudicatory responsibilities, in lthat he "is empowered to conduct hearings and issue written decisions in discrimination cases." *McBride v. American Express Travel*, 2:01-CV-979-K (D. Utah Sept. 13, 2002) (citing Utah Code Ann. §§ 34A-5-104(4)(b), 34A-5-107(4)(b), 34A-5-107(4)(c). He employed these adjudicatory responsibilities when he issued the Determination and Order dismissing Mr. McBride's complaint.

Second, he is also protected under the doctrine of qualified immunity, which shields government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Mr. McBride argues Mr. Gallegos violated his due process rights by failing to conduct a thorough, impartial investigation prior to dismissing his complaint. Like his complaint, his arguments are

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[6] *See McBride v. American Express Travel*, 2:01-CV-979K (D. Utah Sept. 13, 2002).

verbose, but imprecise. He has not alleged specific facts, only unsupported conclusory statements that fail to detail how Mr. Gallegos violated his constitutional rights, and he fails to explain how Mr. Gallegos would have known his conduct was contrary to clearly established statutory or constitutional rights.[7]

Finally, all Title V II claims brought against Mr. Gallegos must fail as a matter of law because Title VII creates a private right of action against employers who allegedly performed unlawful employment practices. *See Haynes v. Williams*, 88 F.3d 898, 899-901 (10th Cir. 1996). Mr. Gallegos was not Mr. McBride's employer.

Accordingly, we AFFIRM the dismissal of Mr. McBride's complaint against Mr. Gallegos for substantially the same reasons articulated by the district court.

Entered by the Court:

TERRENCE L. O'BRIEN
United States Circuit Judge

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[7] "[When] the plaintiff is proceeding pro se, we must construe [his] pleadings liberally, applying a less stringent standard than is applicable to pleadings filed by lawyers. This court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico,* 113 F.3d 1170, 1173-74 (10th Cir. 1997) (quotation marks and citations omitted). "[C]onclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based... Moreover, in analyzing the sufficiency of the [pro se] plaintiff's complaint, the court need accept as true only the plaintiff's well-pleaded factual contentions, not his conclusory allegations." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir., 1991).

2. District Court Basic Order (Filed 9/13/02, Docket No. 43-1)

FILED
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13 SEP 02 PM 4:32
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

HOWARD EARL MCBRIDE, Plaintiff, vs. AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, Defendant and Conspirator, and JOSEPH GALLEGOS, JR. Co-Conspirator,	**ORDER** **Case No. 2:01-CV-979K** [Docket Number: 43-1]

Before the court is Defendant Joseph Gallegos' ("Gallegos") Motion to Dismiss Plaintiff's Amended Complaint. A hearing on the motion was held September 5, 2002. At the hearing, Gallegos was represented by Peggy E. Stone and Plaintiff Howard Earl McBride ("McBride") was present and represented himself *pro se*. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to the motion. Now being fully advised, the court renders the following Order.

I. BACKGROUND

Plaintiff McBride was hired by Defendant American Express Travel Related Services ("Amex") when he was 65 years old. McBride was terminated from his position a short time later. Plaintiff filed an action with the Utah Anti-discrimination and Labor Division ("UALD") complaining of discriminatory employment action taken against him by Amex on September 6, 1999, an original charge on October 12, 1999, and an amended charge on December 20, 1999. Gallegos, the Director of UALD, issued a Determination and Order on May 22, 2001, dismissing the charge of discrimination. Plaintiff's subsequent civil rights claims against the UALD were dismissed by this court on April 10, 2002. McBride filed an Amended Complaint adding claims against Gallegos in his personal capacity for civil rights violations.

II. DISCUSSION

Gallegos moves to dismiss Plaintiff's claims against him on several grounds. Specifically he claims that he is entitled to quasi-judicial immunity, qualified immunity, and that Plaintiff's claims against him fail to state a claim under Title VII.

First, the doctrine of absolute judicial immunity was explained in *Stump v. Sparkman,* 435 U.S. 349, 356-57 (1978), where the United States Supreme Court held that a state judge was immune from damages even where they acted in error, maliciously, or in excess of their authority. The judge could only be liable is they acted "in clear absence of all jurisdiction." *Id.* The doctrine of absolute judicial immunity expanded to the quasi-judicial level to include adjudicative administrative officials because their role is "functionally comparable" to that of a judge. *Butz v. Economou,* 438 U.S. 478, 504 (1978); *see also Atiya v. Salt Lake County,* 988 F.2d 1013, 1017 (10th Cir. 1993).

Gallegos is empowered to conduct hearings and issue written decisions in discrimination cases. *See* Utah Code Ann. § 34A-5-104(4)(b), 34A-5-107(4)(b), 34A-5-107(4)(c). After Gallegos renders a written decision, a party has a right to appeal that decision within 30 days, and if no appeal is taken, the decision becomes a final order. Utah Code Ann. § 34A-5-107(4)(d). If a party exercises the right of appeal, the UALD would be required to show the factual and legal basis for the determination before the review panel. Utah Code Ann. § 34A-5-107(6). Under these state laws, it is clear that Gallegos' position is "functionally comparable" to that of a state judge. Even if Gallegos reached

the wrong conclusion in McBride's case, Gallegos was clearly operating within his jurisdiction and cannot be held liable for damages. McBride could have appealed Gallegos' decision but did not request one.

Further, even if Gallegos was not entitled to quasi-judicial immunity he is entitled to qualified immunity under the facts of this case. Government officials "are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity allows for governmental action while at the same time protecting the clearly established rights of the individual. "[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)). Qualified immunity allows for reasonable mistakes in judgment. This accommodation exists because "officials should not err always on the side of caution" because they fear being sued. *Davis v. Scherer,* 468 U.S. 183, 196 (1984). The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all by the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Therefore, the court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all,

and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). Plaintiff has alleged that Gallegos did not conduct a thorough investigation before issuing the Order and Determination in McBride's case. Assuming that this is true, it does not rise to the level of a constitutional violation. The failure to meet this step of the analysis ends the inquiry. However, even assuming that Plaintiff has alleged a constitutional violation, Plaintiff could not establish that the rights were clearly established at the time of the violation. The "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Gallegos was required by state statute to issue his findings and the plaintiff had avenues available to appeal that finding. There is no clearly established law that would indicate Gallegos was required to reverse his decision, in light of McBride's complaints, in order to avoid constitutional liability.

Throughout his memoranda, McBride has argued against the doctrines of quasi-judicial and qualified immunity as applied to Gallegos in a general sense. However, this court is not in a position to overturn these doctrines or the breadth of case law which has supported them just because the Plaintiff does not feel that the doctrines best serve the interests of justice. If the Plaintiff were able to show that there were specific requirements of the doctrines which Gallegos could not fulfill, then this court would have addressed those points and perhaps the doctrines

would not have applied. Lacking those specific challenges regarding the doctrines' applicability to Gallegos, this court is compelled to follow both the doctrines of qualified immunity and quasi-judicial immunity and dismiss the Amended Complaint against Gallegos. The Title VII claims against Gallegos also fail as a matter of law because the claims would only be proper against McBride's former employer. Even an individual supervisor of an employee cannot be held personally liable under Title VII. *See Haynes v. Williams*, 88 F.2d 898, 899 (10th Cir. 1996). "[T]he language and structure of amended Title VII continue to reflect the legislative judgment that statutory liability is appropriately bourne by employers, not individual supervisors," or other individuals. *Id.* at 901. McBride's Title VII action, to the extent he brings it against Gallegos, is dismissed because Gallegos was never McBride' employer.

III. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that Gallegos' Motion to Dismiss Plaintiff's Amended Complaint is GRANTED, and Gallegos is DISMISSED from this action.

DATED this 13th day of September, 2002

BY THE COURT:

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

B-13

United States District Court
for the
District of Utah
September 24, 2002

- * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-CV-00979

True and correct copies of the attached were either mailed, faxed, or e-mailed by the clerk to the following:

Howard E. McBride
665 E. 300 N.
KAYSVILLE, UT 84037

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3. District Court Order Dismissing Petitioner's Motion to Vacate and Petitioner's Counter Motion (Filed 10/1/2002, Docket No. 52-1)

FILED
Clerk, U. S. District Court
1 OCT 02 PM 3:33
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

HOWARD EARL MCBRIDE,

Plaintiff,

vs.

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, ET. AL.,

Defendants,

ORDER

Case No. 2:01CV979K

[Docket Number: 52-1]

In addition to his September 25, 2002 Motion to Vacate Order Dismissing Gallegos As a Party, Plaintiff has filed a Motion to Vacate Judgment Dismissing with Prejudice All Claims Against Gallegos and a Counter-Motion in Objection to Splitting Off the Gallegos' Portion of Case, Dismissing with Prejudice All Claims Against Gallegos. The court considers these additional motions as motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, for an order altering or amending the Order entered by the court on September 13, 2002.

These motions are redundant and also fail to meet Rule 59 standards. Therefore, for the same reasons the court denied Plaintiff's September 25, 2002 motion, the court denies Plaintiff's Motion to Vacate Judgment Dismissing with Prejudice All Claims Against Gallegos and a Counter-Motion in Objection to Splitting Off the Gallegos' Portion of Case, Dismissing with Prejudice All Claims Against Gallegos.

DATED this 1st day of October, 2002.

/s Dale A. Kimball
United States District Judge

B-16

United States District Court
for the
District of Utah
October 2, 2002

- * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-CV-00979

True and correct copies of the attached were either mailed, faxed, or e-mailed by the clerk to the following:

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SALT LAKE CITY, UT 84145-0898
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C. Other Relevant Orders—Administrative Agencies

THE LABOR COMMISSION OF UTAH
ANTIDISCRIMINATION & LABOR DIVISION
160 East 300 South, 3rd Floor
Saft Lake City, UT 84111

Pursuant to Provisions of Title 34 A- Chapter 5
Utah Code Annotated 1953, as amended

Howard Earl McBride	**DETERMINATION**
Charging Party,	**AND**
vs.	**ORDER**
American Express	UALD NO. AO-0023
Respondent.	EEOC NO.,35C-AO-0023

Under the authority vested in me by the Utah Antidiscrimination Act of 1965, as amended, I issue for the Division the following Determination and Order as to the merits of the subject charge.

1. JURISDICTION

Respondent is subject to the provisions of the Utah Antidiscrimination Act of 1965, as amended, U.C.A. §34A-5-101 et seq., the Age Discrimination in Employment Act of 1967, as amended, the Americans with Disabilities Act of 1990, as amended, and Title VII of the Civil Rights Act of 1'964, as amended. Timeliness and all other jurisdictional requirements have been met.

2. SUMMARY OF CHARGE

The Charging Party filed a charge on October 12, 1999, alleging he was being subjected to unwarranted discipline and unacceptable terms and conditions of employment because of his gender (male) his age (over 40) and disability (hearing impairment). On December 20, 1999, the Charging Party amended his charge to include a retaliation claim based on his discharge of October 21, 1999.

3. SUMMARY OF RESPONSE

The Respondent asserts that the Charging Party was discharged because of a long history of performance problems that began almost immediately after the Charging Party was hired. The Respondent also states that the retaliation claim has no merit because they were not notified that the Charging Party had filed a claim of discrimination until several days after the Charging Party was discharged.

4. FINDINGS

The Respondent hired the Charging Party as a Programmer Analyst I on March 23, 1998. The Respondent was 65 years old at that time. In July 1998, the Respondent spoke with the Charging Party about his substandard performance. By the fall of 1998 the Respondent began to issue written warnings to the Charging Party based on his poor job performance.

On August 20, 1999, due to the Charging Party's failure to improve his performance, the Respondent placed the Charging Party on an Action Plan, which detailed specific improvements that the Charging Party had to make in order to avoid being terminated from his employment.

On October 12, 1999, the Charging Party filed a charge with this Division. A copy of that charge was delivered to the Respondent by certified mail, return receipt requested, on or about October

18, 1999. The Respondent discharged the Charging Party on October 21, 1999. According to the return receipt stamped by the United States Postal Service, the Respondent received a copy of the Charging Party's charge that was sent on October 18, on Friday, October 22, 1999. The person to whom the charge was addressed apparently opened the envelope containing the charge the following Monday, October 25, 1999.

The Charging Party has alleged claims of disparate treatment based on his age, gender, and disability. He also claims he was discharged in retaliation for his participation in these employment discrimination proceedings. The Charging Party's claims will be addressed in the order they appear immediately above.

To establish a claim of disparate treatment based on age, a charging party must demonstrate that:

(1) he was a member of the protected age group;
(2) he suffered an adverse employment action;
(3) at the time of the act complained of he was qualified for his job and was meeting the employer's legitimate expectations;
(4) that similarly situated individuals not of the charging party's protected age group were or would have been treated more favorably. In this case the Charging Party was a member of the protected age group and did suffer adverse employment actions.

However, it does not appear that the Charging Party was qualified for his position.

The Charging Party had a history of performance-related problems that the Respondent attempted to address, not just through warnings and an Action Plan, but also through significant training. In 1998 the Charging Party received over 400 hours of training in comparison to an average of approximately 72 hours for other members of the Charging Party's team. He also received 177 hours of training in 1999, though each employee was budgeted for only 80 hours of

training. In addition, there is no evidence that suggests that other employees not of the Charging Party's protected age group were not or would not have been treated similarly for the poor performance demonstrated by the Charging Party.

Accordingly, the Division finds that there is insufficient evidence to support a prima facie case of age discrimination.

The analysis is similar for the Charging Party's claim that he was discriminated against on the basis of his gender. To establish a prima facie case the Charging Party again must demonstrate that he was qualified for the position, in this case, qualified means performing his job at a level of performance that the employer legitimately expects of similarly situated employees. As stated above, the evidence indicates that the Charging Party was not satisfactorily performing his duties as expected of him or other employees on his team. Therefore, the Division finds that there is insufficient evidence to establish a prima facie case of gender discrimination.

The Division notes also the following facts that the Division believes supports its finding that the Respondent did not subject the Charging Party to disparate treatment on the basis of either his age or gender. First, the Charging Party was hired when he was 65 years of age and was provided with extensive training to help him succeed in his position.

The hiring and extensive training of the Charging Party at a time when he was a member of the protected class of individuals over the age of 40 suggests that the Respondent does not have a discriminatory animus towards the Charging Party or members of the Charging Party's protected class. Second, it appears that approximately half of the Charging Party's nearly sixty colleagues are over 40 themselves, and males significantly outnumbered females. Finally, although two of the three individuals involuntarily discharged from March 1998 through November 1999, were males over the age of forty, the figures demonstrate that relatively few of the approximately 30 employees of Charging Party's protected

class are involuntarily discharged. Also, although there is too small a sample size to draw any accurate inferences, the figures do not indicate a substantial deviation from the expected ratio of employees discharged who are over forty as compared to those under forty to raise an inference of discrimination.

The Charging Party also claims that he has a disability in the form of a hearing impairment that he substantially corrects with a hearing aid. Because his hearing loss is corrected, he does not meet the standards established by the Americans with Disabilities Act. To be protectable under that Act, an impairment must substantially limit one or more major life activities. The Charging Party does not allege that his hearing impairment substantially limited any major life activity and it appears that his alleged hearing loss either was not severe or was mitigated by the use of a hearing aid. Therefore, the Division finds that the Charging Party's alleged hearing loss did not substantially limit any major life or work activities.

In addition, to establish a prima facie claim of discrimination based on a disability a charging party must demonstrate that they were otherwise qualified for the position from which they were discharged. And as stated, the Division does not find sufficient evidence to establish that the Charging Party was qualified for his position.

Turning to the Charging Party's retaliation claim, the Charging Party claims he was discharged in retaliation for his having filed a charge of discrimination with this Division. Individuals who participate in proceedings under Title VII, the Age Discrimination in Employment Act, the Equal Pay Act, or the Americans with Disabilities Act, are entitled to broad protection against retaliation. Once an employer is put on notice that a person is participating in any anti-discrimination proceedings the employer's conduct towards that person will be scrutinized, regardless of the merit of the underlying charges.

In this case, the Respondent discharged the Charging Party on October 21, 1999. This was soon after the Charging Party's

charge was filed with this Division on October 12, 1999. The temporal proximity of the discharge and the filing of the charge with this Division **would ordinarily establish a presumption of retaliation**. However, it appears as though the Division did not notify Respondent of the Charging Party's charge and his participation in protected proceedings until October 22, 1999; one day after the Charging Party was terminated.

The Charging Party did not mention to the Respondent that he filed a charge until he was in the process of packing his belongings after being discharged.

Therefore, the Division finds that the Respondent's decision to discharge the Charging Party **was not, and could not have been, motivated in any way by an intent to retaliate against the Charging Party** [emphasis added] for his participation in these proceedings because the Respondent was not aware of the Charging Party's participation at the time it decided to discharge the Charging Party.

Accordingly, the Division concludes there is NO REASONABLE CAUSE to believe it was more likely than not that the Charging Party was subjected to the discriminatory practices alleged.

ORDER

IT IS THEREFORE ORDERED that the adjudicative proceedings of the Division are completed and the charge of discrimination is dismissed.

IT IS FURTHER ORDERED that any appeal of this Order must be received by the Division within thirty (30) days from the date of the issuance of this Order. The request must be made in writing and must request from the division Director a formal evidentiary hearing. If no timely appeal is made, this Order becomes the final order of the Commission.

The Charging Party may request a Substantial Weight Review by the Equal Employment Opportunity Commission by notifying the following within fifteen (15) days of the date this Order becomes a final action of the Utah Labor Commission:

Antonio DeDios, State & Local Coordinator
Equal Employment Opportunity Commission
3300 North Central Avenue, Suite 690
Phoenix, AZ 85012

s/ Joseph Gallegos, Jr.
JosephGallegos, Jr.
Director

Order dated 5/22/01
Date

CERTIFICATE OF MAILING

I certify that on May 22, 2001, I mailed a copy of the attached Determination and Order by putting them into the state mail system to the following parties at the following addresses:

Howard Earl McBride
665 E 300 N
Kaysville, UT 84037

Lara Pantin
American Express
Asst Manager Of Legal Affairs
200 Vessey St., 49th Fl
New York, NY 10285

D. Motion for Rehearing (Denied, Filed 9/27/02, Docket No. 49-1)

FILED
Clerk, U. S. District Court
27 SEP 02 PM 1:01
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

HOWARD EARL MCBRIDE, Plaintiff, vs. AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, ET. AL., Defendants,	**ORDER** **Case No. 2:01CV979K** [Docket Number: 49-1]

On September 25, 2002, Plaintiff filed a Motion to Vacate Order Dismissing Gallegos As a Party. The court considers this a motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, for an order altering or amending the Order entered by the court on Sept. 13, 2002.

LEGAL STANDARD

Rule 59(e) of the Federal Rules of Civil Procedure authorizes a motion to alter or amend a judgment after its entry. However, "[a] Rule 59(c) motion to alter to amend the judgment should be granted only **to correct manifest errors of law** [emphasis added] or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Thus the scope of Rule 59(e) is quite limited:

> A party should not use a motion for reconsideration to reargue the motion or present evidence that should have been raised before. Moreover, a party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden. When a motion for reconsideration raises only a party's disagreement with a decision of the Court, that dispute "should be dealt with in the normal appellate process, not on motion for reargument under" [Rule 59(e)].

NL Indus., Inc. v. Commercial Union Ins. Cos., 938 F.Supp. 248, 249-50 (D.N.J. 1996) (internal quotes omitted); *Resolution Trust Corp. v. Greif*, 906 F.Supp. 1446, 1456-57 (D.Kan. 1995)("A party cannot invoke Rule 59(e) to raise arguments or present evidence that

should have been raised in the first instance or to rehash arguments previously considered and rejected by the court.").

DISCUSSION

After full considering Plaintiff's objections, the court finds that Plaintiff's motion for reconsideration is without merit. Plaintiff has failed to meet his burden under Rule 59. Plaintiff merely disagrees with the Court's order. Plaintiff's motion merely rehashes his previous arguments or makes arguments that were available to him before. Plaintiff has not demonstrated any manifest error in law or new evidence. Therefore, Plaintiff's motion is DENIED.

DATED this 26th day of September, 2002.

/s Dale A. Kimball
United States District Judge

D-4

United States District Court
for the
District of Utah
September 30, 2002

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-CV-00979

True and correct copies of the attached were either mailed, faxed, or e-mailed by the clerk to the following:

Howard E. McBride
665 E. 300 N.
KAYSVILLE, UT 84037

Ms. Elisabeth R. Blattner, Esp.
PARSONS BEHLE & LATIMER
201 S. MAIN ST. STE 1800
PO BOX 45898
SALT LAKE CITY, UT 84145-0898
EFAX 9,5366111

E. Judgment Sought to Be Reviewed (Filed 9/24/02, Docket No. 44-1)

FILED ORIGINAL
Clerk, U. S. District Court
Receiving Clerk

24 Sep 02 AM 11:34
2002 Sep 23 P 3:17
DISTRICT OF UTAH
BY: _____ U. S. District Court
DEPUTY CLERK District of Utah

PEGGY E. STONE – 6658
Assistant Utah Attorney General
MARK L. SHURTLEFF – 4666
Utah Attorney General
Attorneys for Joseph Gallegos
160 East 300 South, Sixth Floor
P. O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100

[Docket 44-1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

HOWARD EARL MCBRIDE,

Plaintiff,

vs

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY,

Entered on docket
9-24-02 by:
s/ D. King
Deputy Clerk

JUDGMENT

Case No. 2:01-CV-979K

Judge Dale A. Kimball

and

JOSEPH GALLEGOS, JR.
Co-Conspirator,

AND OTHER JOHN DOES

RECEIVED [stamp partially illegible]
SEP. ??, 2002
OFFICE OF
JUDGE DALE A. KIMBALL

On September 5, 2002, this Court held oral orgument on the motion to dismiss filed by Defendant Joseph Gallegos. Counsel representing all parties were present and oral argument was accepted from the plaintiff and defendant Gallegos. The Court took the matter under advisement at the conclusion of the hearing.

On September 13, 2002, this Court issued its order granting the motion to dismiss as to defendant Gallegos and dismissing all of the plaintiff's claims against him.

Because this Court's order disposes of all claims against defendant Gallegos, pursuant to Fed. R. Civ. Pro. 54(b), this Court hereby expressly finds that there is no just reason for delay of the entry of a final judgment dismissing the plaintiff's claims against him and the Court directs that judgment be entered in favor of defendant Gallegos, dismissing with prejudice all of the plaintiff's claims against him.

So ordered this 24th day of September, 2002.

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

E-3

United States District Court
for the
District of Utah
September 24, 2002

- * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:01-CV-00979

True and correct copies of the attached were either mailed, faxed, or e-mailed by the clerk to the following:

Howard E. McBride
665 E. 300 N.
KAYSVILLE, UT 84037

Ms. Elisabeth R. Blattner, Esp.
PARSONS BEHLE & LATIMER
201 S. MAIN ST. STE 1800
PO BOX 45898
SALT LAKE CITY, UT 84145-0898
EFAX 9,5366111

Peggy E. Stone, Esq.
UTAH ATTORNEY GENERAL'S OFFICE
LITIGATION UNIT
160 E. 300 S. 6th FL
PO BOX 140856
SALT LAKE CITY, UT 84114-0856
EFAX 9,3660150

F. Statutory, Constitutional and Jurisdictional Matters

The District Court entered judgment supposedly in accordance with FRCP 54(b) on Sept. 24, 2002. The primary statutory basis for appealability is 28 U.S.C. Section 1291, particularly the parts related to multiple parties and severability of one or more parties, improperly done here.

The appeal from the District Court's judgment and orders to the U. S. Court of Appeals (10th Circuit), which "rubber stamped" (affirmed) the District Court's rulings in all particulars, hence have all the same defects, was Appellate Court Case No. 02-4216. Nominally, the three circuit court judges involved in the appellate ruling were Circuit Judges Seymour, Murphy, and O'Brien, with the Appellate ruling being entered by the court under the signature of Terrence L. O'Brien. In so doing, two levels of the federal court structure became involved in the scandal which has constituted the handling of this case, instead of being part of the solution to the scandal.

G. Other Parts of the Record Worthy of Particular Attention

1. Motion to Vacate Order Dismissing Gallegos As a Party (Details on a Multitude of Errors, Filed 9/25/02, Docket No. 48-1)

[Items which pertain to the main Defendant, irrelevant to this petition, and items duplicative of either the Petition itself or Docket 48-1 hereafter have been removed—with headings retained.]

Name: Howard Earl McBride
Address: 665 E. 300 N., Kaysville, UT 84037
Telephone: (801) 546-1987

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

Howard Earl McBride, Plaintiff v. American Express Travel Related Services Company	**Motion to Vacate Order Dismissing Gallegos As a Party**

Defendant and Conspirator,	Civil No. 2:01CV-979K
and	Magistrate Judge Alba
Joseph Gallegos, Jr., David Pena, and Other John Does,	Judge Dale A. Kimball
Co-Conspirators	[Docket 48-1]

Howard Earl McBride, acting *pro se*, submits the following in support of a Motion to Vacate the Order Dismissing Gallegos As a Party, issued Sept. 13, 2002.

I. ARGUMENT

It is requested that the Order dated Sept. 13, 2002, which dismissed Director Gallegos as a party be vacated in its entirety for the following reasons:

A. THE ORDER'S OVERALL RESULT-- A TRAVESTY OF JUSTICE, HEAVILY CONTRARY TO THE PUBLIC INTEREST IN GOOD, HONEST GOVERNMENT:

Error #A-1: The Court Order Undermines Investigations as Being a Search for Truth:

* * *

Error #A-2: Failing to Recognize the Pre-eminent Status of the XIVth Amendment

* * *

Error #A-3: Building Unwarranted Obstacle Courses Impeding Settlement and Redress for Legitimate Grievances (Creating a Judicial Variant of Obstruction of Justice):

* * *

B. UNCONSTITUTIONAL PROVISIONS OF THE ORDER--DUE PROCESS CONSIDERATIONS

Error #B-1: The Order ignored a prime purpose of the Due Process clause, which is to prevent the abuse of governmental power.

* * *

Error #B-2: The Order Greatly Trivialized the "Due Process" Impact of a Dishonest, One-Side Investigation:

* * *

Error #B-3: In this kind of a case, the two most critical components for assuring just and fair outcomes of the legal process, hence realistic due process, are, (1) at the fountainhead, a reasonably accurate gathering of facts as they really are in the real world, portraying the true

merits of the respective cases of the adversaries, and (2) having a fair judge adjudicate the case. These are *sine qua non* prerequisites.

* * *

Error #B-4: Does this Order itself conform to Due Process requirements of the XIVth Amendment to the Constitution? How Crucial Is "Due Process" In the Dispensing of Justice?

* * *

Error #B-5: Are Fair and Honest Investigation Standards a Crucial Prerequisite to Proper Due Process?

* * *

Error #B-6: Did the Actual Conduct of the Investigation Conform to Statutory and Due Process Standards?

The actual investigation, if such it could be called, was a farce--the exact opposite of what Utah's anti-discrimination statute mandates. Some of the characteristics of the so-called investigation were:

a) Investigators were sent on two separate occasions (May 30, 2000 and Apr. 18, 2001) memoranda and copies of this photo of Plaintiff's own case file, filled with documentary evidence, much written at the various times the discriminatory incidents occurred. **Investigators didn't look at a single page** [emphasis added].

b) Various ways of corroborating that extensive documentary evidence exist.

c) Thus, for investigators, a remarkable lack of curiosity was shown about finding out the real-world facts of the case--so findings and conclusions could be rendered based on genuine comparative merits of the respective cases.

d) The investigation was called to an abrupt halt shortly after Plaintiff sent a second copy of the above photo (Apr. 18, 2001) and an accompanying memo to remind the UALD that there was much of Plaintiff s evidence which yet needed to be put on the table for consideration.

e) The Determination and Order which was issued reflected the defects of the corrupted and totally biased investigatorial process that was followed, which, contrary to statutory requirements, had considered only one side of the story throughout.

f) The writer of that Determination and Order accepted every single assertion of Respondent, however far-fetched, with two minor exceptions.

g) Defendant's New York lawyers, without any personal knowledge of the real facts of the case, had contrived out of their own imaginations libelous characterizations of Plaintiff bearing little resemblance to the real-world Plaintiff, and passed on their propagandistic characterizations of Plaintiff to the UALD as if they were fact.

h) The New York lawyers even added their own embellishments which seriously contradicted characterizations of Plaintiff being made by Salt Lake management. (See Exhibits A and B of the *Amended Complaint.*)

i) Even when circumstances were admitted to be suspicious by the UALD investigator (such as the fact that there was only a one day difference between the day Plaintiff was fired and the alleged date the Defendant received UALD's formal notification letter that Plaintiff's case was being accepted for investigation), all of Respondent's assertions were accepted as if they were fact. These dates were crucial relative to the issue of retaliation. For further details about the rigging of a postmark date in order to argue non-retaliation, see Exhibit J of the *Amended Complaint.*

Thus, the so-called investigation was a gross not marginal violation of Due Process, trampling upon Plaintiff's Constitutional rights and prostituting one of the most critical elements in the process of dispensing justice (an honest and fair investigation)--thereby corrupting the legal process. Defendant's attorneys have tried to trivialize or ignore such corruption, pretending that it didn't occur. The court's Order also trivializes the corruption which took place, as well as its impact on Due Process.

Error #B-7: "Therefore, the court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001)."

a) The 14 pages of Exhibit M and the 3 pages of Exhibit G in the *Amended Complaint* cite many instances of violations of Plaintiff's constitutional and statutory rights.

b) Plaintiff's memorandum dated July 12, 2001, to Charles Burtner, EEOC District Director (copied to Director Gallegos) states the following:

(1) "The 'investigation' of my case was concluded suddenly and the Determination and Order was prepared **without my having had a single face-to-face meeting with the**

investigators, and I had plenty of evidence waiting to be put onto the table. Much evidence also had been supplied already, but it seems like it was totally disregarded. **There was one brief phone call**. I view the current Determination and Order as being a total whitewash."

(2) "Although I have the opportunity of appealing the findings, which is in process, it also seems like I have not even come close to having **Due Process** [emphasis added] in the investigatorial phase--nothing like the framers of discrimination laws would anticipate."

"When I reviewed by case file around June 25th [2001], I discovered that systematically that case file was missing some important documents and explanatory attachments to other documents. I counted 35 medium- to high priority documents which were not in my case file. I counted another 11 documents which were in my case file about which I had no prior knowledge or copies..."

Error #B-8: "Plaintiff has alleged that Gallegos did not conduct a thorough investigation before issuing the Order and Determination in McBride's case. Assuming that this

is true, it does not rise to the level of a constitutional violation. "

This conclusion is not only mistaken; it is incredible. How can an "investigation" which has been paid **zero attention to Plaintiff's side of the case** [emphasis added] **not rise to the level of a constitutional violation?** This case concerns conduct at its furthest possible extremes. There is some serious misapprehension regarding the facts of this case underlying this conclusion.

The issue is not that Gallegos "did not conduct a **thorough** investigation", which implies a continuum of varying degrees of thoroughness. The real issue is that he did not conduct **any investigation at all (or so token as to be negligible)** insofar as Plaintiff's side of the case was concerned--and that **does** rise to the level of a Constitutional violation by the express language of the XIVth Amendment. Even worse, there was evidence tampering, and systematic destruction of documents favorable to Plaintiff's case.

Error #B-9: " The failure to meet this step of the analysis ends the inquiry."

* * *

Error #B-10: "However, even assuming that Plaintiff has alleged a constitutional violation, Plaintiff could not establish that the rights were clearly established at the time of the violation."

* * *

Error #B-11: "The contours of the [constitutional or statutory] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

* * *

Error #B-12: "Gallegos was required by state statute to issue his findings..."

* * *

Error #B-13: " There is no clearly established law that would indicate Gallegos was required to reverse his decision, in light of McBride's complaints, in order to avoid constitutional liability."

* * *

Error #B-14: The Order Failed to Take into Account the Respective Credibilitiy Differences Between Eyewitness vs. Manufactured Evidence

* * *

C. UNCONSTITUTIONAL PROVISIONS OF THE ORDER--THE PRESUMED IMMUNITIES:

Error #C-1: Immunities Granted Are Limited and Must Be Justified on Their Merits; Even "Absolute Immunities" Are Not Totally Absolute Under Our Constitutional Form of Government

Error #C-2: Expansion of Absolute Immunity to "Quasi-" Public Servants

* * *

Error #C-3: The Order Ignored the Required Balancing of Interests When Declaring Theories of Immunities:

* * *

Error #C-4: The Utah Legislature, in Drafting the Utah Antidiscrimination Act, Explicitly Classified the Investigative Function and Division as Administrative; a Separate Organizational Function and Division is Classed As Adjudicative

* * *

Error #C-5: The Explicit Language and Specifications of Case Law Relative to Qualified Immunities Repeatedly Disqualify Director Gallegos As Being Eligible.

* * *

Error #C-6: "Qualified immunity allows for governmental action while at the same time protecting the clearly established rights of the individual. "

This statement further disqualifies Director Gallegos from being eligible for qualified immunity for his extreme set of actions, actions which defaulted in major ways in "protecting the clearly established rights of the individual".

Where is that protection of the clearly established rights of the individual in this case under this ruling, which undercuts redress for grave violations of those rights, and gives the violator an artificial safe haven. The UALD, under Director Gallegos, did everything within its power, including felonious evidence tampering, to subvert Plaintiff's legitimate attempt to obtain redress for grave and extensive grievances.

Error #C-7: "[W]here an official's duties legitimately require action <u>in which clearly established rights are not implicated</u> [emphasis added]**, the public interest may be better served by action taken 'with independence mid without fear of consequences."' *Id.* at 819 (quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).**

* * *

Error #C-8: "The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent <u>or those who knowingly</u>

violate the law. [emphasis added]" ***Malley v. Briggs*, 475 U.S. 335, 341 (1986).**

* * *

Error #C-9: "Qualified immunity allows for reasonable mistakes in judgment. This accommodation exists because 'officials should not err always on the side of caution because they fear being sued'". *Davis v. Scherer*, 468 U.S. 183, 196 (1984).

* * *

Error #C-10: "Throughout his memoranda, McBride has argued against the doctrines of quasi-judicial immunity and qualified immunity as applied to Gallegos in a general sense.,."

* * *

Error #C-11: "However, this court is not in a position to overturn these doctrines or the breadth of case law which has supported them because the Plaintiff does not feel that the doctrines best serve the interests of justice. "

* * *

Error #C-12: "If the Plaintiff were able to show that there were specific requirements of the doctrines which Gallegos could not fulfill, then this court would have

addressed those points and perhaps the doctrines would not have applied."

* * *

Error #C-13: "Lacking those specific challenges regarding the doctrines' applicability to Gallegos, this court is compelled to follow both the doctrines of qualified immunity and quasi-judicial immunity and dismiss the Amended Complaint against Gallegos.

* * *

D. UNCONSTITUTIONAL PROVISIONS OF THE ORDER--EQUAL PROTECTION OF THE LAW CONSIDERATIONS:

Error #D-1: The Order ignored the fact that this case involved the unequal enforcement of a valid statute?

...It is self-evident that the effect of a corrupted investigation is clearly discriminatory.

Was the corrupted investigation motivated by a discriminatory purpose? There is substantial evidence that such was the case, including:

> ...When Defendant belatedly admitted a former false statement, after the Determination and Order had been promulgated and the lie had accomplished its purpose, still nothing was done to rectify the damage that had been done, or undoing the effects of false

conclusions which had been based on the lie. It was a significant lie bearing upon the retaliation issue. Defendant now admitted that Plaintiff had notified Defendant almost a month before (Sept. 24, 1999) Plaintiff's unlawful termination (Oct. 21, 1999) that he had filed a formal discrimination complaint against Defendant.

When the retaliation actually occurred, which happened in a brazen manner, the UALD looked the other way (selective lack of enforcement). To state the obvious, it doesn't do any good to issue a sheet warning employers not to retaliate if that warning is not going to be enforced.

Error #D-2: Does this Order itself conform to Equal Protection requirements of the Constitution?

...Equality of right is fundamental to both.

(*Washington Nat. Ins. Co. v. Board of Review of N. J. Unemployment Compensation Commission*, 1 N.J. 543)

> Constitutional rights are "...too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from their denial." (*Glaser v. United States*, 315 U.S. 60, 76, 1942).

Further:

> "...**there are some Constitutional rights <u>so basic to a fair trial that their violation can never be harmless error</u>**...[emphasis added]" (*Chapman v. California,* 386 U.S. at 22, 23).

Error #D-3: Failure to Recognize that Gallegos Conduct of This Case Seriously Violated Plaintiff's "Equal Protection" Rights:

* * *

Error #D-4: Failure to Recognize That Director Gallegos is Not Above the Law, and that the UALD, and Director Gallegos, Need to Obey the Very Law They Are Supposedly Enforcing:

* * *

Error #D-5: The Order Failed to Recognize the UALD's Willing Lack of Enforcement of its Own Fact Sheet on Employer Retaliation

Along with its certified notification letter to an employer that a formal discrimination complaint has been filed, the UALD sent a FACT SHEET ON EMPLOYER RETALIATION. Some extracts from that sheet include:

> "The Utah Anti-Discrimination Act prohibits employers from retaliating against an employee regarding a charge of employment discrimination. Section 34-35-2(17) of the Utah Anti-Discrimination Act defines 'retaliate' as:
>
> '[T]the taking of adverse action by an employer...against one of its employees...because he or she has opposed any employment practice prohibited under this chapter or because he or she **has filed charges**, testified, assisted, or

participated in any way in any proceeding, investigation, or hearing under this chapter.'

"...This protection applies regardless of the validity of the complaining employees charge."...

E. OTHER ERRORS OF FACT IN THE ORDER:

Error #E-1: The ruling asserts that: "McBride could have appealed Gallegos' decision but did not request one." Also: "...the plaintiff had avenues available to appeal that finding."

Plaintiff utilized avenues of appeal, some of which did not materialize. Inappropriately, the State Attorney General's office tried to interfere and put roadblocks in the way of Plaintiff's exercising his rights to appeal.

In actuality, Plaintiff requested the conventional appeal to the Labor Board but nothing came of it in a timely manner; hence the UALD never undertook to "show the factual and legal basis for the determination before the review panel." (Utah Code Ann. § 34A-5-107(6)).

The Labor Division Appeal began as follows:

"Date: May 31, 2001

To: Joseph Gallegos, Jr., Director
Utah Antidiscrimination and Labor Div.
160 E 300 S., 3rd Floor
P. O. Box 146630
Salt Lake City, UT 84114-6630
Phone: (801) 530-6801

From: Howard Earl McBride
665 E. 300 N.
Kaysville, UT 84037
546-1987

Subject: Request to Appeal the Findings and Conclusions of Determination and Order (UALD No.: A0-0023 and EEOC No.: 35C-A0-0023)

I hereby request that the Findings and Conclusions of the above Determination and Order be appealed. I also request a formal evidentiary hearing of my anti-discrimination case.

Concurrently, I am requesting a Substantial Weight Review by the Equal Employment Opportunity Commission, a copy of such request being attached hereto."

The specific reasons for the appeal are then cited.

The EEOC Appeal:

The request to the EEOC for a Substantial Weight Review was made the same day but never materialized in a timely manner. This request began as follows:

"Date: May 31, 2001

To: Antonio DeDios,
State and Local Coordinator
Equal Employment Opportunity Commission
3300 North Central Avenue, Suite 690
Phoenix, AZ 85012

From: Howard Earl McBride

665 E. 300 N.
Kaysville, UT 84037
546-1987

Subject: Request for Substantial Weight Review (UALD No.: A0-0023 and EEOC No.: 35C-A0-0023)

I hereby request a Substantial Weight Review for your case number 35C-A0-0023.

I already have requested an appeal on the Determination and Order issued by the UALD in my case. A copy of that appeal request is attached hereto. I believe my case has been handled in an irresponsible manner, with heavy bias against me. As described in my appeal request, the UALD seemed to be bending over backwards to exonerate American Express (even in the face of extensive evidence to the contrary)..."

F. THE ERRORS OF MATTERS OF LAW IN THE ORDER:

Error #F-1: "The Title VII claims against Gallegos also fail as a matter of law because the claims would only be proper against McBride's former employer. Even an individual supervisor of an employee cannot be held personally liable under Title VII. See *Haynes v. Williams*, 88 F.2d 898, 899 (10th Cir, 1996).

* * *

G. THE ADVERSE EFFECTS OF THE ORDER ON EXISTING CORRUPTION OF LEGAL PROCESSES INVOLVED, AND ENCOURAGEMENT OF FUTURE CORRUPTION:

* * *

H. ASPECTS OF THE ORDER WHICH NEGATE PUBLIC POLICY AND ESSENTIALLY NULLIFY THE ANTI-DISCRIMINATION STATUTES, FEDERAL AND STATE:

* * *

I. SILENCE OF THE ORDER ON SOME CRITICAL ISSUES:

Error #I-1: The State Attorney General's Office, in Providing Legal Counsel for Gallegos, Was in an Improper Conflict of Interest Situation.

* * *

Error #I-2: The Attorney General's Office's Trying to Defend That Which Is Indefensible...

* * *

J. DISASTROUS LEGAL PRECEDENTS:

Error #J-1: Degree of Immunity Covering a Bona-Fide Judge vs. Varying Degrees of Quasi-Judges (Judges by Imputation for Doing Duties More or Less Functionally Comparable to a Real Judge):

* * *

Error #J-2: This Would Treat Gallegos Like a Judge Without Requiring Him to Act Like a Judge:

* * *

K. THE MISCHIEF OF OTHER ADVERSE SIDE-EFFECTS TO THIS ORDER:

Error #K-1: This order would remove Plaintiff's opportunity to use Discovery and Interrogatory Processes, as well as Trial Itself, to Answer Some Important Questions Which Cry Out for Answers (and Should Not Be Swept Under a Rug)

1. Why was a UALD investigator and/or other UALD employee(s) willing to commit the felony of evidence tampering in multiple instances, including the manipulation of the case file?
2. What lead the UALD to block the consideration of almost the entirety of Plaintiff's documentary evidence, which was carefully written and substantially produced at or near the times of the various discriminatory incidents?
3. Why was there a 100% pro-Defendant bias in the investigation?
4. Was David Pena, the concluding investigator, hired as a "plant" (hired in March of 2001 and resigned in Sept. of 2001) specifically for the purpose of "throwing" the investigation in favor of Defendant?
5. Was bribery, graft, or any other undue influence exercised to cause or facilitate Pena to act in

defiance of the anti-discrimination statute's fairness and impartiality requirements to systematically undercut Plaintiff in his legitimate search for redress? Who, if anyone, profited from the way this case was handled?

6. Have other cases been handled with the same recklessness regarding factuality as this case was handled?
7. What do UALD time clock records reveal relative to how the investigators spent their time? How much time?
8. Why, when serious errors were pointed out to Director Gallegos, was there never any corrective action taken?
9. How cozy is the relationship between Gallegos and/or Pena and Amex?

Error #K-2: This Order would artificially and unjustly make Gallegos the prevailing party insofar as the conspiracy, fraud, and obstruction of justice issues are concerned, and subject Plaintiff to some absurd, totally unwarranted costs:

* * *

II. CONCLUSIONS

It is therefore requested that the Order dated Sept. 13, 2002, dismissing Gallegos as a party in this case be vacated in its entirety, for the reasons stated above, and that Gallegos be restored to this case as a co-conspirator.

Howard Earl McBride

Plaintiff, acting *pro se*

CERTIFCATE OF SERVICE

I hereby certify that on this 25th day of September, 2002, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **Motion to Vacate Order Dismissing Gallegos As a Party** to:

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_____

Howard Earl McBride

2. Extract of Relevant Materials from Petitioner's Counter-Motion (Docket 36-1, June 2002) Objecting to the Dismissal of All Claims with Prejudice Against Director Gallegos

[Seemingly Unread by the Trial Court or Appellate Court]

Howard Earl McBride, Petitioner in this case, acting *pro se*, submits the following *Memorandum to Deny the Gallegos Motion to Dismiss the Amended Complaint.*

PREFACE

…[T]he title of the Gallegos motion is improper, misclassifying the status of Gallegos. The title reads: "State **Defendant's** Motion to Dismiss Amended Complaint". Amex is the Defendant, Gallegos is charged with being a co-conspirator (a different role)…

"…[W]hat is the propriety of the State Attorney General's Office acting as counsel for Gallegos, funded by the taxpayers, especially given the nature of charges or allegations against Gallegos (knowingly operating in a manner diametrically opposed to the statutory requirements applying to his agency)? This places the Attorney General's Office in a posture of automatic conflict of interests in two different ways:

1. As the legal arm of the state, the Attorney General's Office has a direct responsibility to Petitioner, or any other citizen who was the illegal target of discrimination, to see that the discrimination laws have been enforced, as written, in behalf of those so targeted.
2. As the legal arm of the state, the Attorney General's Office has a direct responsibility in behalf of all citizens of the state to be a watchdog or guardian against **governmental corruption** in the processes carried on by the state. This responsibility should be an active not a passive one...

It is apparent that Petitioner has a powerful case, heavily documented, that can be corroborated in a variety of ways, and that the handling of Petitioner's case by UALD officials seriously violated both federal and state anti-discrimination statutes, was Constitutionally defective, violated ordinary principles of justice and equity, and even involved criminal acts (i. e., evidence tampering)...

[T]he motion of Gallegos' attorney(s) and petition for "dismissal with prejudice" is the wrong remedy for this case, operating against the public interest in clean and honest government as well as the public interest in eliminating discrimination. The remedy prescription is like that of a doctor's prescribing chemotherapy when a band-aid will do.

It is also apparent that stretching the "rubber band" of immunities far beyond permissible limits is an invitation to disaster, which undercuts the opportunity for demanding accountability of public servants (even in circumstances as extreme as this case has become).

Thus, Petitioner has viable claims against not only the Amex Defendant, but also against the two official employees of the UALD named as co-conspirators who performed their official duties in a scandalous manner as described…in the *Amended Complaint*.

Exhibit A

Rule 12(b)(6) Standard Supports Rejection of the Attorney General's [Gallegos'] Motion

The Attorney General request for dismissal indicates: "Dismissal is appropriate when it appears that the Petitioner can prove no set of facts that would entitle Petitioner to relief and the case can be dismissed with prejudice".

The Evidentiary Fact Basis: Petitioner has extensive documentary evidence of wrongdoing by each of co-conspirators Gallegos and Pena, acting as employees or officials of the UALD, including multiple incidents of evidence tampering, a second degree felony under Utah law. The manner in which the co-conspirators at the UALD handled this case in its many facets was in direct defiance of explicit provisions of the Utah Anti-discrimination Statute and in a manner which undermines the very purpose of that statute…

Overpowering and multi-faceted documentary evidence clearly proves that a corrupted legal process produced a corrupted result in this case. Thus, the Rule 12(b)(6) standard clearly indicates that the requested dismissal cannot properly be done, but argues for exactly the opposite treatment. The standard, as described, should terminate suits that "are fatally flawed in their legal premises and destined to

fail." Such is not the case in this instance. This case is even more powerful in its evidentiary basis and similar in key respects to *Reeves v. Sanderson Plumbing* (120 S. Ct. 2097, especially at pages 2099, 2101, and 2108) in which a unanimous Supreme Court ruled that age discrimination had occurred... Much of the Supreme Court's ruling was based on the employer's track record of falsehoods in that case... Review Exhibit E of Petitioner's Complaint for 11 sample citations extracted from that landmark case, mostly relating to employer dishonesty and its relationship to proving discrimination.

Since this case is not fatally flawed, either in law or equity, and is destined for success in any court following *Reeves vs. Sanderson Plumbing* (120 S.Ct. 2097) and similar cases, a dismissal is inappropriate on those grounds, and, in fact, the same criterion argues strongly for a non-dismissal--letting the adversaries "duke it out" on the genuine merits of their respective cases at trial.

The Entitlement to Relief Issue: Petitioner and his family have been damaged directly and severely, and will continue to be damaged for the foreseeable future to the tune of several hundred thousand dollars.

The failure of these two UALD officials or employees to carry out their solemn duties in the just and equitable manner mandated by the statute facilitates the occurrence of, and continuation of these extensive damages. Further extensive indirect or non-monetary damages exist, which qualify for substantial relief under either state or federal law.

The "Most Favorable Light" Issue: Under this rule, "...the court presumes all the allegations are true, and views the pleading in light most favorable to the non-moving party." The Gallegos Counsel's motion runs directly counter to this specification. [So does the Trial Court's rulings and the Appellate Court's rubber stamping of the same.]

Exhibit B

Expanded Statement of the Facts of the Case

a) There were some critical omissions in the statement of the facts of this case, omissions that indicate the reasons why these two UALD current and/or former officials or employees were included as co-conspirators in the *Amended Complaint* in the first place…

b) Investigators were sent on two separate occasions (May 30, 2000 and Apr. 18, 2001) memoranda and copies of this photo of Petitioner's own case file, filled with documentary evidence, much written at the various times the discriminatory incidents occurred. **Investigators didn't look at a single page** [emphasis added].

c) The Determination and Order which was issued reflected the defects of the corrupted and totally biased investigatorial process that was followed, which, contrary to statutory requirements, had considered only one side of the story throughout.

d) The writer of that Determination and Order accepted every single assertion of Respondent, with two minor exceptions, however far-fetched.

Exhibit C

Argument--Point I: Gallegos Has Quasi-Judicial Immunity

1. The Gallegos Motion alleges: "UALD Director Gallegos is entitled to quasi-judicial immunity"…

> "...[W]hen a state official's acts are in excess of legal authority or constitute an erroneous exercise of that authority, **the interest in the protection of the Petitioner's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine**" (*Pamela B. v. Mert,* 244 Conn. 296 and 709 A.2d 1089, 1992)…
>
> "Furthermore, it has been said that an officer who acts illegally is not acting as an officer, but stands in the same light as any other trespasser" (Feldman v. Ho, 120 S. Ct. 323)…

* * *

4. The Gallegos Motion alleged: "The doctrine expanded to include adjudicative administrative officials, because their role is 'functionally comparable' to that of a judge.'

Expansion of quasi-judicial status, hence judge-like immunities, to administrative officials is not a blank check proposition—but can be a recipe for dictatorship… Over-extending the definition and coverage of "*quasi-*": The Supreme Court rejected the misclassification of [one] Petitioner's claiming to be quasi-legislative (*Arizonans for Official English v. Arizona*, 520 U. S. 43 (1997)

"…Basically, this document (the Determination and Order) is a collection of faked evidence and assertions. In putting his signature on that document, Gallegos certified to the world that the representations made in that document reflect the real world—things as they really were and are. That is not the case here, even remotely…

Exhibit D

Argument—Point 2: Gallegos Is Entitled to Qualified Immunity

* * *

(2) …The wording of [Gallegos'}…duty is explicitly stated as follows:

> "The **division and its staff, agents, and employees** shall conduct **every** investigation **in fairness to all parties** and **agencies involved...**" (see Utah Code Annotated, 34A-5-107(3)(c)).

* * *

4. "...The qualified immunity doctrine protects the exercise of discretion in an effort to promote the 'public interest in encouraging the vigorous exercise of official authority..."

The "vigorous exercise of official authority" is not inherently in the public interest, as alleged. History is replete with examples of abuses of authority…Here, a great opportunity was bungled to further the cause of prohibiting discrimination. A rigorous investigation into the facts of this case would have revealed a rich storehouse of documentary evidence chronicling the history and issues of this case, and how at least one major corporation went about discriminating then attempting to avoid the legal consequences thereof. What we have here with Director Gallegos is more like an on-duty guard who is asleep at his post…

* * *

6. "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or **those who knowingly violate the law**..." [emphasis added]

This statement also convicts rather than exonerates Director Gallegos, who knowingly violated the law in allowing the pretense of an investigation, which directly violated the statutory standards of an investigation, to become the basis for the faked evidence/findings codified in the Determination and Order, issued under Director Gallegos' signature. It may be noted that Petitioner's former employer (Defendant) later admitted, after the

Determination and Order was issued, that a key factual statement relating to retaliation was false.

7. "...Thus, the Court must first determine **whether the Petitioner has alleged the deprivation of an actual constitutional right at all**, and if so, proceed to determine **whether that right was clearly established at the time of the alleged violation...**"

   a) The 14 pages of Exhibit M and the 3 pages of Exhibit G in the *Amended Complaint* cite many instances of violations of Petitioner's constitutional and statutory rights [as do many other of Petitioner's documents].

   b) In Petitioner's memorandum dated July 12, 2001, to Charles Burtner, EEOC District Director (copied to Director Gallegos) is the following:

      (1) The 'investigation' of my case was concluded suddenly and the Determination and Order was prepared **without my having had a single face-to-face meeting with the investigators, and I had plenty of evidence waiting to be put onto the table.** Much evidence also had been supplied already, but it seems like it was totally disregarded. **There was one brief phone call**. I view the current Determination and Order as being a total whitewash."

      (2) "Although I have the opportunity of appealing the findings, which is in process, it also seems like I have not even come close to having **Due Process** [emphasis added] in the investigatorial phase--nothing

like the framers of discrimination laws would anticipate."…

8. "...[T]here have been no constitutional violations in this case. This failure to satisfy the first step in the analysis ends the inquiry and requires dismissal of the claims..."

This assertion is dramatically false in many ways, including:

a) Director **Gallegos was responsible to assure that Petitioner received a fair and full investigation, one which complied with the statutory standards for an investigation**. Petitioner did not receive such, a mishandling which jeopardizes Petitioner's attempt to seek redress for the violations of his rights. This attempted deprivation of Petitioner's rights by Gallegos was knowingly done, for Director Gallegos had explicit supervisory duties to assure that Petitioner was treated fairly in the investigation.

b) Director Gallegos is responsible for each and every false finding contained in the Determination and Order, which bears his signature. Each false finding acts towards jeopardizing Petitioner's ability to obtain redress for the violation of his statutory and constitutional rights. This network of falsehoods is worthless as evidence regarding discrimination, because of the lack of a bona fide

underpinning investigation, but is very substantive in proving conspiracy * * *

16. "...Director Gallegos was required by state statute to issue his findings..."

This assertion is true but fails to state that such findings were to be issued after an **impartial** investigation of **all** allegations and that **every** investigation had to be **fair** to all parties. The fairness is prerequisite to a just outcome. The lack thereof produces an unjust outcome, violative of Petitioner's rights * * *

19. "...There is no clearly established law indicating [sic] that Director Gallegos was required, in order to avoid constitutional liability, to reverse his decision..."

This statement is erroneous. There is a clearly established law, well known to Director Gallegos. The Utah Antidiscrimination statute reads as follows concerning UALD investigations:

> "If no settlement is reached, the investigator shall make a prompt **impartial** investigation of **all** allegations made in the request for agency action. The division and its staff, agents, and employees shall conduct **every investigation** in **fairness to all parties and agencies involved...**" (see Utah Code Annotated, 34A-5-107(3)(b) and (c)).

A reversal would have been particularly appropriate when Director Gallegos learned of Defendant's belated retraction

of a former key falsehood, a falsehood incorporated into the Determination and Order. Director Gallegos is accountable for that Determination and Order in its present condition, which is deplorable. This situation puts both Director Gallegos as well as anyone else that attempts to use that Determination and Order, as if it were legitimate, in the precarious position of knowingly using false information (which is a crime all by itself). [Simply stated, the Determination and Order, in its present condition, does not comply with the law, even remotely.]

20. "...Therefore Petitioner cannot overcome Director Gallegos' presumptive qualified immunity and accordingly, the constitutional claims against him should be dismissed with prejudice..."

> This assertion is erroneous. The presumption that Director Gallegos is entitled to qualified immunity under the conditions which apply in this case (evidence tampering, total bias of the investigatory process, concoction of a collection of fake evidence, disregard of Petitioner's due process and equal protection rights, defiance of the state's own anti-discrimination statute, etc.) is preposterous and would constitute a cover-up…Petitioner's constitution rights cannot be whisked away by gross misapplication of the doctrine of qualified immunity. Such a contrived and supposed immunity does not take precedence over Petitioner's constitutional rights.

Exhibit E

Argument--Point 3: Petitioner's Claims Against the UALD Fail As a Matter of Law

1. **UALD/Gallegos Is Not Petitioner's Employer:** Nowhere has Petitioner claimed that the UALD or Co-conspirator Gallegos was his employer, so this argument is almost totally irrelevant... The discrimination claims themselves apply to Defendant not to the co-conspirators. However, the processing or handling of those claims do apply to the co-conspirators. The named individuals substituting as parties for the UALD as an organization have the power and capacity to conspire and can be liable to the extent of guilt under conspiracy statutes.